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Erasing Race?: A Critical Race Feminist View of Internet Identity-Shifting

Margaret Chon*

I. INTRODUCTION

“Algo de mi se ha perdido	“Something of mine is lost
Entre tu casa y mi casa	Between your house and mine
Será el calor que no abrasa	It’s the heat that doesn’t singe
No es de gozo	Not from joy
No es de ira	Not from anger
Como tampoco es mentira	Nor is it a lie
Que algo de ti se ha escondido”	That something of yours is hidden” ¹

If race “signifies and symbolizes social conflicts and interests by referring to different types of human bodies,”² then what is race on the Internet? Digital bodies arguably do not exist. The lack of a physical component to Internet identities thus potentially undermines a core assumption of critical race feminism and other critical legal theories: that physical differences among bodies along axes of class, race, gender and sexual orientation result in systematic differences in political power, and ergo, legal treatment.

Despite the erasure of physical markers such as bodies, race on the Internet does exist. It is enacted in large part by movements between embodied presences in real physical space—such as African American male bodies being less able than other types of bodies to hail a cab successfully in New York

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1. SUSANA BACA, *NEGRA PRESENTUOSA (PRETENTIOUS BLACK GIRL)* (Luaka Bop, Inc. 1997).
2. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S*, at 55 (1994).

City³—and disembodied presences in virtual space.⁴ I term the former type of racial presence “material race” and the latter “virtual race.” How we view and treat material race affects, and even predetermines, how we view and treat virtual race. The former necessarily impacts the latter. While traditional political and legal boundaries are challenged by virtual space, the boundedness of race and gender can be stubbornly resistant to the social fluidity created by the Internet. Not all boundaries are being erased by the Internet, yet it is difficult to pinpoint which and in what ways boundaries matter. The task of identifying emerging boundaries of significance on the Internet is part of what I call the “boundary evaluation problem” and is the major intellectual project of this Essay. Critical race feminism suggests that durable boundaries may be along the axes of race and gender.

When material identity markers such as physical appearance are erased from social dialogue, what takes their place are dominant cultural assumptions about what is normal. For U.S. Internet users, numerically dominated by White Americans who live and work in highly segregated environments, normal means White. At the cusp of the millennium, the default setting for virtual race is White. For those whose material race is non-White, racial formation on the Internet then can be viewed alternatively as a form of “passing,”⁵ a type of assimilation, or an unstated racial assumption imposed by others upon the user. Regardless of one’s material racial identity, participation on the Internet tends to encourage both voluntary and involuntary movement into a White virtual race.

The performative explanation of race, like gender, emphasizes the choices made by individuals against the background of cultural assumptions and norms.⁶ For example, someone can choose a White rather than Latino identity and continue to perform through language-based choices as White on the Internet. But the vaunted fluidity of identity on the Internet does not work equally in both directions. On the Internet, it is harder for this Latino to perform as Latino based on his identification with Latin American history, culture and

3. See Paul Sullivan, *Celebrity, Glover to Cabbies: Pick Up Blacks or Quit*, BOSTON HERALD, Dec. 7, 1999, at 24 (explaining an incident where actor Danny Glover could not hail a cab in New York City).

4. I avoid the term “cyberspace” here for a number of reasons, including the fact that it is already highly charged with meanings, such as the minimization of social relations within the technological frame, that I intend to challenge here.

5. See Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1737 (1993) (stating that “[i]nherent in the concept of ‘being white’ was the right to own or hold whiteness to the exclusion and subordination of Blacks” thus giving rise to the practice of passing). Harris describes her grandmother, a fair-skinned Black woman, who worked as a clerk in a retail store at a time when Blacks were not employable in such occupations. *Id.* at 1710-13.

6. See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 140 (1990) (stating that “[i]n what senses, then, is gender a act? As in other ritual social dramas, the action of gender requires a performance that is *repeated*”) (emphasis in original).

norms, because non-textual markers such as dress, body movement, inflection and facial expression are absent in text-based interactions, which comprise the majority of Internet interactions. Even if we suppose that he is a light-skinned Latino with an Anglo surname, he may be able to perform his Latino identity in real space with many more tools than are available in virtual space. In an environment such as the Internet where cues based on physicality are missing, race performers then often have to rely on pre-existing "categories for defining and distinguishing self and other and the context for interaction."⁷ How the "audience" for this performance perceives race depends in large part on their pre-conceived notions of race and racial difference. I term this phenomenon the "reversion effect" and explore it in greater detail within the later sections of this paper. This tendency to revert to pre-existing cultural scripts is exacerbated by the ability of Internet users to control their informational environment to a greater extent than attainable in the material world, an effect that has been called "oversteer."⁸ This greater control can result, of course, in the filtering out of information that might challenge or contradict these pre-existing categorical constructs of race and gender.

Race is not only performed but is also imposed upon social actors. Structural and institutional reasons for this shift into White virtual racial identity are manifold. They include a powerful ideological⁹ framework of race based on the concept of colorblindness, that is: race is a characteristic that should not be socially, politically, economically or legally significant.¹⁰ The geographic, linguistic, social and economic terrains of the Internet are in fact numerically dominated by those whose material race is White.¹¹ Virtual race is also coded as White because Internet users respond to the technological constraints of this technological historical period, constraints that currently allow identities to be presented in textual form far more easily than in graphic

7. Jodi O'Brien, *Writing in the Body: Gender (Re)production in On-Line Interaction*, in *COMMUNITIES IN CYBERSPACE* 76, 95 (Marc A. Smith & Peter Kollock eds., 1999).

8. See ANDREW SHAPIRO, *THE CONTROL REVOLUTION* 104 (1999).

9. I use the term "ideological" in a non-pejorative sense to mean simply a set of cognitive mechanisms and constructs that organize the world in a certain way. Cf. J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 2-3 (1998) (proposing a theory of ideology that "describe[s] effects produced by the tools of human cultural understanding").

10. See Neil Gotanda, *A Critique of "Our Constitution Is Colorblind,"* 44 *STAN. L. REV.* 1, 55-56, 59 (1991) (explaining that "[t]he color-blind assimilationist ideal seeks homogeneity in society rather than diversity. . . . [It] ignores, and thereby devalues, culture-race. . . . Implicit in the color-blind assimilationist vision is a belief that, ultimately, race should have no real significance").

11. See Paul Foley & David Sutton, *Boom Time for Electronic Commerce—Rhetoric or Reality?*, *BUS. HORIZONS*, Sept. 1, 1998, at 21 (explaining that as of 1996, only six percent of Internet host sites were located in Asia, Africa, the Middle East and South America).

representational form.¹² And finally, most—critical race theorists and others—assume that a rational individual would opt out, if possible, of a racial identity that holds negative connotations and especially one that bears negative consequences either on- or off-line. Or perhaps, since there are few, if any, perceived risks to being White rather than non-White, why not?

Without a theoretical framework that “emphasize[s] conscious consideration of the intersection of race, class, and gender by placing them at the center of analysis,”¹³ it is far too easy to perceive Internet identities as ones constructed by liberal or libertarian political assumptions about the individual in which formal equality (“all men are created equal”) is conflated with material equality.¹⁴ Yet, significantly, almost no literature on identity-shifting on the Internet has originated from or focused on the significance of a racial identity position.¹⁵ And similarly, while gender-conscious studies are available, none address the intersection of race and gender on the Internet.

Analyzing the Internet from either a race- or gender-conscious stance raises several questions that cannot be definitively answered here. Does the Internet make a qualitative or merely a quantitative difference in the social inequities that have been documented by feminist and critical race theorists? Will it tend to exacerbate the material differences between men and women, or will it tend to reduce them? Will there be unintended benefits from racial identity-shifting or unforeseen downsides? For example, Jerry Kang concludes that the Internet could be designed consciously to ameliorate racial inequalities in the physical world.¹⁶ My more pessimistic claim is that the movement into virtual Whiteness is not one that lifts everyone up, but rather one that subtly obscures the enduring nature of material racial categories. Far from liberating us from “the epidermal schema of race difference,”¹⁷ Internet activities may reinscribe racial

12. When Internet communications are not coded as White—as in the graphic depictions of sexualized racial others—the racial gaze is coded as White and the other becomes a hyper-racialized object of racial performance. See *infra* text accompanying notes 13-15.

13. Adrien Katherine Wing, *Introduction to CRITICAL RACE FEMINISM: A READER* 1, 4 (Adrien Katherine Wing ed., 1993).

14. See Margaret Chon, *Radical Plural Democracy and the Internet*, 33 CAL. W. L. REV. 143, 152-53 (1997).

15. See Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1131, 1135-56 (2000) (explaining that race is a mechanism through which identity is constituted and that the Internet may be used to either reproduce or challenge such mechanisms).

16. *Id.*

17. Elaine K. Ginsberg, *Introduction: The Politics of Passing*, in *PASSING AND THE FICTIONS OF IDENTITY* 1, 4 (Elaine K. Ginsberg ed., 1996) (quoting FRANZ FANON, *BLACK SKIN, WHITE MASKS* 112 (1967)) (discussing racial and gender identity in the context of “passing,” the phenomenon of generating a perception of oneself by others different than one’s assigned identity).

fault lines and reinforce racism. This is because structural (or unconscious)¹⁸ racial discrimination is not necessarily motivated by overt racial animus. Thus, the apparent racelessness of the Internet may play into a larger ideological construct of colorblindness that allows us to downplay negative racial stereotyping and other forms of racially subordinating behavior,¹⁹ rather than examining and bringing to light racially problematic digital activities. In a post-Jim Crow, post-Civil Rights Movement world in which it is usually not acceptable to express openly hateful biased thoughts, racial and other forms of discrimination are typically comprised of failures to recognize (or to act upon) structural inequalities.

Using critical race feminism as a theoretical tool and some legal cases as data points, I attempt to trace some of the ways in which material racial identities might intersect with virtual racial identities in the context of a virtual environment coded largely as White, and in order to support and reinforce racially hierarchical structures in the physical world. Those structures include not only unequal distribution of the portals to technology, but more importantly, unequal distribution of the wealth and status generated by the digital economy. Among other things, both critical race and critical race feminist theory would predict that wealth and status will accrue to those who are materially White because these are so self-evidently central to their self-interests.²⁰ In this digital world, which is a mix of material and virtual, race is used to define, police and enforce who can be a "have" and who is a "have not." Social relations on-line are related to social relations in physical space.²¹ Hence, virtual identity is

18. See Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-23 (1987) (arguing that a false dichotomy exists between the Supreme Court's concepts of intentional and unintentional racial discrimination laws because racial discrimination is easy to hide and because the resulting harm is the same, regardless of the intent).

19. See Linda Hamilton Kreiger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188 (1995). Stereotypes bias "[i]n predictable ways the perception, interpretation, encoding, retention, and recall of information about other people. These biases are *cognitive* rather than *motivational*. They operate absent intent to favor or disfavor members of a particular social group." *Id.* at 1188 (emphasis in original).

20. Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). Bell states that

[t]he interests of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the [F]ourteenth [A]mendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior social status of middle and upper class whites.

Id.

21. See Chon, *supra* note 14, at 143 (discussing the Internet's potential to move us toward the concept of a radical plural democracy).

related to material identity. The relationship, however, is neither linear, nor necessarily always liberating.

At this point in Internet time, the trajectory of race has not been clearly drawn. Thus, in making these claims, I emphasize their provisional rather than conclusive nature. The primary purpose of this Essay is simply to assert that race matters on the Internet. With some legal examples, I intend to challenge the already conventional and unexamined wisdom that virtual identities are racially unproblematic. While these are an admittedly non-random sample of Internet interactions, they demonstrate quite clearly that negative impacts of race are very much alive and well in a digital environment. A critical race feminist perspective is skeptical about the claim that the looseness of virtual identities will reduce the effects of material identities (gender or race) either on- or off-line.

A few words here about law as information. Traditional views of law see it as outside the thing that is regulated: Law is a formal mechanism for regulating social behavior. Digital networked technology is regulated by law, but also regulates through the computer programmer's design choices or even through user choices.²² Moreover, interpretive and critical theories have done much to show that law simultaneously constructs and is constructed by culture.²³ In addition, legal theorists are now making the same point with law, social norms and technology—that these three categories are mutually constitutive.²⁴ If social regulatory structures can be coded, then why not use code to encourage a race-neutral world? Concededly, Internet architectures may impact positively on race relations.²⁵ But a critical race feminist theory may illustrate also that “neutral” laws, social norms and technologies are in fact racially pre-coded and pre-arranged—and indeed, that they may be resistant to racial rearrangement to a greater degree that we might anticipate.

22. Many of these choices are undiscussed in any public forum and invisible to an unsophisticated user. For example, many users may be unaware that they leave a digital trail when they browse among websites that allows others to track their movements in cyberspace. Or, other users may be under the misimpression that deleting an e-mail message actually removes it permanently from computer memory, rather than copying it to a different section of memory.

23. See, e.g., Eric K. Yamamoto et al., *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1 (1994) (examining Native Hawaiians' right to sue for land claims).

24. See Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection* (last modified Feb. 16, 1999) <<http://www.law.indiana.edu/glsj/vol6/no1/aoki.html>> (describing how Vandana Shiva points out that “[r]epresenting the cultural property of non-European peoples as natural or primitive equates such properties as unowned and up for grabs by erstwhile and entrepreneurial ‘civilized proprietors.’ Any formulation of the intellectual public domain must take account of the culture-bound nature of our concepts of property”); see also Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 896 (1996).

25. See Kang, *supra* note 15, at 1133 (asking “[c]an cyberspace change the very way that race structures our daily lives?”).

II. THE INTERNET: DECENTRALIZATION, INTERTEXTUALITY AND OVERSTEER

The dominant attributes of the Internet are often described by reference to the characteristics of the technology itself, then, secondarily as social activities that users can undertake with the technology. One such characteristic is the Internet's decentralizing impetus. Thus, one popular notion among Internet First Amendment advocates is that the "Internet interprets censorship as damage and routes around it."²⁶ Notice that this phrase anthropomorphizes the Internet into an actor, much as American law anthropomorphizes private corporations as "persons" to be protected from government regulation under the Bill of Rights.²⁷ This aphorism also glorifies the lack of sovereign control, the decentralization, and even the anarchy created by the technology. There is no one central guiding institutional force except for the Internet itself and savvy "insiders" who know how to manipulate it around government control.²⁸ For example, the governments of Canada and Germany have laws against certain forms of hate speech.²⁹ After these laws were applied to ban particular websites, individuals in other countries, in protest over these acts of state censorship, set up their own websites containing the offending material, with mirror sites all over the world.³⁰ Germans and Canadians were thus able to evade their national laws. The predominant view of leading Internet theorists is that digital networked technology promotes individual freedom by, for

26. Michael Froomkin, *The Internet as a Source of Regulatory Arbitrage*, in BORDERS IN CYBERSPACE 129, 143 (Brian Kahin & Charles Nesson eds., 1998).

27. See *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394, 394-95 (1886) (explaining how corporations are "persons" for purposes of the Fourteenth Amendment). The implications of this holding for First Amendment jurisprudence are explored in DAVID SKOVER & RONALD COLLINS, *THE DEATH OF DISCOURSE* 103-04 (1996).

28. See generally Keith Aoki, *Considering Multiple and Overlapping Sovereignities: Liberalism, Libertarianism, National Sovereignty, "Global" Intellectual Property, and the Internet* (last modified Feb. 1, 1999) <<http://www.law.indiana.edu/glsj/vol5/no2/5aoki.html>> (pointing out that western governmental interests have thrived under the liberal vision of a "public sphere" in which autonomous individuals act, and that the Internet has been forced to adopt this vision under the current dominant legal regime, thus creating tension with the idea of globalization in which difference is engaged and not homogenized and controlled, erasing economic and political inequality without rectifying it).

29. See Sionaidh Douglas-Scott, *The Hatefulness of Protected Speech: A Comparison of the American and European Approaches*, 7 WM. & MARY BILL RTS. J. 305, 309-11 (1999).

30. See Viktor Mayer-Schönberger & Teree E. Foster, *A Regulatory Web: Free Speech and the Global Infrastructure*, in BORDERS IN CYBERSPACE, *supra* note 26, at 234, 242 (explaining how Chinese human rights activists use the World Wide Web to advocate their cause, how Tibetan women in exile speak about the Chinese government's treatment of their sisters and how German Nazis use American and Canadian web sites to discuss fascism).

example, allowing individuals to move from a greater to less oppressive state regulatory regime.³¹

Moreover, the Internet is characterized by tremendous fluidity as well as interactivity across time and space. It encourages interpretive activity that is highly unrestricted compared to many analogous physical communicative activities. For example, a usenet news group based on a many-to-many communication model allows much more interactivity and proliferation of meaning than a one-to-many broadcast of an evening television program. This proliferation of means of expression allows a greater freedom for individuals to interpret and re-interpret events along the lines of Justice Holmes' "marketplace of ideas" metaphor.³² I have used the term "intertextuality" elsewhere to denote the interactive, fluid and equalizing communicative activity around content on the Internet.³³ It is relatively simple and cheap to set up a website and expound one's views.³⁴ One can easily interlineate reactions to an e-mail message with the original text. Theoretically, all of these technological avenues should encourage the practices of deconstruction and narrative, the primary tools of critical theories. Information is no longer concentrated within the hands of a few hegemonic or corporate meaning-makers. As pointed out in a different context, racially or sexually coded imagery can no longer be presumed to have a single meaning once interpretive techniques such as deconstruction are employed by artists or others who simply want to articulate their viewpoint.³⁵

At first glance, the Internet characteristics of decentralization and fluidity, glorified and practiced by many of its most astute users, seems to threaten one of the central principles of critical race feminist theory: that race and gender are

31. See Froomkin, *supra* note 26, at 142 (discussing how the "[m]ultinational nature of the Internet makes it possible for users to . . . choose to evade disliked domestic regulations by communicating/transacting under regulatory regimes with different rules").

32. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Id.

33. See Margaret Chon, *New Wine Bursting from Old Bottles: Collaborative Internet Art, Joint Works and Entrepreneurship*, 75 OR. L. REV. 257, 266 (1996) (proposing that print-based copyright principles unduly distort the creative process in a networked computer environment).

34. See Foley & Sutton, *supra* note 11, at 21 (stating that "[t]he Net is said to represent a level playing field posing minimal entry barriers for businesses seeking new markets and distribution channels").

35. See Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1546-48 (1996) (critiquing Catherine MacKinnon and Mari Matsuda's theories of interpretation as not accounting for certain progressive/left forms of expression).

fundamental features of our social fabric.³⁶ If everything is more fluid, including censorship laws, then why should virtual identity, based on race or gender, be exempt? For example, Professor Sherry Turkle, a sociologist and psychologist who writes highly regarded works about the Internet and identity, relates how she entered a multi-user domain with the handle Magenta guest.³⁷

While I was struggling with basic MUD commands, other players were typing messages for all to see such as "Magenta_guest gazes hot and enraptured at the approach of Fire_eater." . . . Again I was tempted to hide from the frat party atmosphere by trying to pass as a man. When much later I did try playing a male character, I finally experienced that permission to move freely I had always imagined to be the birthright of men. Not only was I approached less frequently, but I found it easier to respond to an unwanted overture with aplomb³⁸

This short excerpt is a narrative of mastery, of a woman successfully passing into male identity. It presumes that once male identity is achieved on the Internet, the user will experience in an unproblematic sense the "permission to move freely" attributed to males in the material world.

However, at the same time that the Internet opens up the possibilities of communicating easily across distances of time, space and social position, Andrew Shapiro posits that it also gives users greater power to shape the information to which they are exposed, a potential move towards information filtering and parochialism that he dubs "oversteer."³⁹ This control over informational content may act as a check to the horizon-expanding aspects of digital technology. And as Keith Aoki has also commented,

because Internet users are able to filter out unwanted content and information, the Internet may become the ultimate social insulator. Unlike the print or broadcast media (or even the library), as we continue to be able to fine-tune our content filters to ever subtler graduations, we embrace a selective social blindness and amnesia to larger pressing social and political issues that are critical to the

36. See Wing, *supra* note 13, at 2-3.

37. See SHERRY TURKLE, *LIFE ON THE SCREEN: IDENTITY IN THE AGE OF THE INTERNET* 211 (1993) (footnote omitted) (relating her and others' experiences with identity transformation and manipulation via the Internet and interpreting these experiences in the context of the wider psycho-social consequences of identity construction via the Internet).

38. *Id.*

39. SHAPIRO, *supra* note 8, at 104.

“meatspace” in which all Internet dwellers live (or at least park their bodies).⁴⁰

Thus, while Professor Turkle may claim to have experienced a type of identity-shifting that allowed her to experience a different perspective, social behavior on the Internet also consists of user choices that simultaneously result in narrower exposure to “others” who do not fit into the informational world view constructed by the user with the aid of technology.

This suggests that while people on the Internet may be exposed (perhaps for the first time in their lives) to women posing as men, they still treat virtual men as material men are treated in the real world. Indeed, even Professor Turkle’s self-exploration (of meeting the “other” within the “self”) seems to be scripted along highly conventional lines, such that the experience of being a man is the experience of being more assertive and less fearful. The question from a critical race feminist perspective is whether or how an identity shift such as Professor Turkle’s causes others to view gender. Will the social category of gender be treated truly differently—not in the narrow sense of whether others view her truly as a man but whether she and others who respond to her then construct a world in which gender does not cause a systematic maldistribution of resources and power, either on- or off-line? To answer this question more fully, we turn to the critical standpoints represented by feminist or critical race feminist theories.

III. CRITICAL STANDPOINTS: FEMINIST/RACE THEORIES AND DIGITAL IDENTITY

Why focus on digital race or gender shifting from critical perspectives? Without this inquiry, social relationships that are antithetical to core democratic values of freedom and equality would remain buried in universalizing, homogenizing, “gee whiz” attitudes toward technologies such as digital networked computers—technologies that, despite the bits and bytes, are essentially social activities. Without a theoretical framework that foregrounds the social aspects of technology, virtual identity passing would be seen as

40. Keith Aoki, *Six Degrees of “Me”* (visited Apr. 16, 2000) <<http://jurist.law.pitt.edu/lawbooks/revdec99.html>>.

In a world in which we live in our well insulated personal balkanized and atomized “bubble-universes” whether it be “model-railroaders,” “gamers anonymous,” “depression-era glass collectors,” “earth firsters,” “Star Wars: The Phantom Menace fans,” “radical pro-life activists,” or any number of a potentially infinite menu of virtual “communities” composed of members of newsgroups, mailing lists, ftp sites and interlinked horse-blinded personal webpages the elevation of “Six Degrees of ‘Me’” to a solipsistic ruling idea—what chance is there for the shared consensual experiences of social life that create the significant and sometimes messy political interactions that are the necessary preconditions for self-governance?

Id.

inconsequential or, if acknowledged, of a positive nature. However, the social activity of passing from one material identity to another almost invariably brings into question, sometimes violently, the prevailing social order and ways in which material identities are in fact critical sites of social control.⁴¹ The transgressive nature of “passing” is shown by the recent film *Boys Don’t Cry*, which is based on the true story of a woman, Teena Brandon, who passed for a man, Brandon Teena, and was brutally murdered as a result of her passing into a status that was not her privilege to assume.⁴²

Both critical race and critical race feminist theory begin with following premises: (1) “racism is an ordinary and fundamental part of American society, not an aberration that can be readily remedied by law;”⁴³ (2) “white elites will tolerate or encourage racial progress for minorities only if doing so also promotes white self-interest;”⁴⁴ and finally (3) dominant legal theories such as “neutral principles” or “color blindness” tend to support racial hierarchy.⁴⁵

As Professor Eric Yamamoto points out, drawing from the work of feminist and other theorists, specifically Iris Marion Young:

[U]nderstanding group oppression and its companion concept of domination is the starting point for achieving justice for those most often subject to society’s “disabling constraints”—racial minorities, women, gays and lesbians, and the differently abled. Traditionally, oppression meant tyranny by a ruling elite. A prime example is the pre-1993 overtly racist apartheid regime in South Africa Young broadens this definition of oppression to include structural phenomena. Oppression can be systematic; it can be built into institutional structures such as schools, churches, business, law, medicine, media, and government bureaucracies. . . .

. . . These “disabling constraints” of racial exclusion and subjugation are particularly insidious in post-civil rights America because they are informed by unquestioned norms of group behavior and unexamined assumptions about institutional rules.

For this reason, critical race theorists identify the dominant group’s self-interest, rather than ignorance or enmity, as a major factor

41. See Ginsberg, *supra* note 17, at 1 (discussing racial and gender identity in the context of “passing,” the phenomenon of generating a perception of oneself by others different than one’s assigned identity).

42. *BOYS DON’T CRY* (Killer Films 1999).

43. Wing, *supra* note 13, at 2.

44. *Id.* at 3.

45. *Id.*

in the conservative federal judiciary's narrowing of civil rights doctrine. . . . Along with critical sociologists, cultural anthropologists, and cognitive psychologists, they move inquiry into the sources of racial oppression away from "a coherent, discrete cluster of beliefs and attitudes held by individuals and social groups and toward the study of how racial meanings are implicated in discourses, institutional power arrangements, and social practices that may or may not be explicitly marked as racial."⁴⁶

Professor Adrien Katherine Wing states that "[c]ritical race *feminists* . . . call for a deeper understanding of the lives of women of color based on the multiple nature of their identities. They emphasize conscious considerations of the intersection of race, class, and gender by placing them at the center of analysis."⁴⁷

I will refer to this package of principles by shorthand as critical race feminist theory. Critical race feminist theory not only foregrounds the social significance of a classed, raced and gendered identity, but it also assumes that such identities have meaning. Methodologies often chosen by critical theorists (both race and non-race) include deconstruction, narrative and the deliberate consideration of situated and multiple, intersecting perspectives. Thus, critical race theorists will be among the first to question the "reality" of race, emphasizing instead the contingency of identity;⁴⁸ the dangers of insisting on a reified, essential, single category of social analysis;⁴⁹ the lack of biological coherence to racial categories;⁵⁰ as well as the need to tolerate differences within and between racial categories.⁵¹ So, for example, an Asian American

46. ERIC YAMAMOTO, *INTERRACIAL JUSTICE CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 86-87 (1999) (footnotes omitted).

47. Wing, *supra* note 13, at 4 (emphasis added).

48. See Robert Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism and Narrative Space*, 81 CAL. L. REV. 1241, 1266-67 (1993) (arguing that civil rights work and critical race scholarship often fail to address issues unique to Asian Americans and proposing a framework for constructing an "Asian American Legal Scholarship").

49. See, e.g., Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (maintaining that many White feminist legal theorists essentialize women's experiences by describing them independently of race and other "realities of experience," thereby silencing the unique voices of Black women); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1281 (1997) (proposing the application of cosynthesis theory to explain the negligence of police officers who were duped by Jeffery Dahmer into believing that a 14-year-old non-English speaking Hmong boy found naked and bleeding outside Dahmer's apartment building was his 19-year-old boyfriend).

50. See KWAME ANTHONY APPIAH, *IN MY FATHER'S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE* 3, 29 (1992) (discussing W.E.B. Du Bois's theory of race, which posits that the conception of race is not a biological notion, but a socio-historical concept).

51. See YAMAMOTO, *supra* note 46, at 99 (discussing the differences and tensions between various minority groups).

racial identity category is one that is characterized as much by heterogeneity (ethnic group, distance from the immigrant experience, sexual orientation, etc.) as by the homogeneity produced by the consistent exposure to racial discrimination.⁵² In contrast, the enduring meaning ascribed to race by critical race theorists in the face of intra-group differences is one grounded in the empirically verified observation that race makes a huge difference in distribution of society's material benefits—power and resources—as well as its withholding of such benefits. One example of this is the disparate access to computer technology such as the Internet. Racial discrimination occurs when we reinforce and reinscribe the banality of social inequities that fall along racial fault lines.⁵³

Because there are practically no studies of racial identity-shifting on the Internet, the inquiry begins with the relatively more robust body of literature on gender-shifting. This literature demonstrates a spectrum of opinions about the effect of virtual gendered identities on material gendered identities. And it also illustrates the differences in the kinds of identity-shifting that can take place, from passing or trespass (a form of deception with respect to one's "true" identity) to assimilation (a form of mutual assent to the identity change).

A. Virtual Gender: Feminist Perspectives on Internet Identity-Shifting

The crossing of gender or racial boundaries is something that is yet to be high on the list of America's favorite television sitcom plots. Nonetheless, examples of gender bending in recent Hollywood films range from *The Crying Game*⁵⁴ to *Mulan*⁵⁵ to *Shakespeare in Love*⁵⁶ to the previously mentioned *Boys Don't Cry*.⁵⁷ In the recent animated Disney release, the mythical Chinese woman warrior Mulan disguised herself as a man so as to spare her elderly father from military service.⁵⁸ When her gender identity was revealed after she was wounded in battle, her punishment should have been death.⁵⁹ In another recent popular cultural box office success, the protagonist Violet in *Shakespeare in Love* pretended to be a man so that she could act in the all-male

52. See LISA LOWE, IMMIGRANT ACTS: ON ASIAN AMERICAN CULTURAL POLITICS 60 (1996).

53. See OMI & WINANT, *supra* note 2, at 55.

54. THE CRYING GAME (Channel Four Films 1992).

55. MULAN (Walt Disney Pictures 1998).

56. SHAKESPEARE IN LOVE (Miramax Films 1998).

57. BOYS DON'T CRY, *supra* note 42.

58. See MULAN, *supra* note 55.

59. *Id.*

Elizabethan stages.⁶⁰ While she did not risk death, she did risk the loss of social standing should her true identity as a woman of means be discovered.⁶¹

Interestingly, *fewer* well-known examples involve transracial identity-shifting, a silence which may be attributed to the insistence in our culture on viewing race as a variable that is best downplayed. By contrast, sexual identity and gender are both acknowledged, if sometimes in fragmented ways, to be foundational identity markers.⁶²

Unlike the medium of television, the medium of the Internet has generated intense interest in the question of gender bending. The literature on gender and the Internet illustrates some of the "cyberfeminist" positions already staked out in the articulation of virtual identities. A theoretical pioneer is Donna Haraway, who posited a cyborg—part person, part computer—whose ever-shifting identity could be resistant to the multiple oppressions of gender.⁶³ As she stated in an early, highly influential essay:

It is not clear who makes and who is made in the relation between human and machine. It is not clear what is mind and what is body in machines that resolve into coding practices. Insofar as we know ourselves in both formal discourse (e.g., biology) and in daily practices (e.g., the homework economy in the integrated circuit), we find ourselves to be cyborgs, hybrids, mosaics, chimeras. Biological organisms have become biotic systems, communications devices like others. There is no fundamental, ontological separation in our formal knowledge of machine and organism, of technical and organic.⁶⁴

Some believe that the Internet represents the complete separation of self from body, so that material identities in the form of gender eventually will no longer exist in any meaningful form.⁶⁵ At the other extreme, some theorists assume that virtual identity is simply an extension of an embodied material sexual

60. See SHAKESPEARE IN LOVE, *supra* note 56.

61. *Id.*

62. Professor Chang points out the examples of the movie *Soul Man*, or Eddie Murphy's skit on *Saturday Night Live* where he puts on whiteface and learns about all the benefits of Whiteness. E-mail from Professor Robert Chang to Professor Margaret Chon (Jan. 28, 2000) (on file with author).

63. See Donna Haraway, *A Manifesto for Cyborgs: Science, Technology, and Socialist Feminism in the 1980's*, SOCIALIST REV., Mar.-Apr. 1985, at 65-107.

64. *Id.* at 97.

65. See Kira Hall, *Cyberfeminism*, in COMPUTER-MEDIATED COMMUNICATION: LINGUISTIC, SOCIAL AND CROSS-CULTURAL PERSPECTIVES 147, 151 (Susan C. Herring ed., 1996) (quoting Trudy Barber, a London-based virtual reality artist, as stating: "I like sex. I like men. I like women. . . . I don't care about what language you use. I don't think I'm being oppressed by any male. I think that people should try and explore their sexualities, and virtual reality is one of those tools which they can use").

identity.⁶⁶ Still others believe that the gender and sexual identity will not be completely erased, but the possibilities for multiple and broader identities will be enhanced by digital technologies.⁶⁷ Some observers acknowledge the verbal aggression characteristic of much free-form Internet communication, but contend nonetheless that virtual space equalizes the conditions of communication between men and women.⁶⁸ Others hotly contest the claim that the playing field is leveled between virtual women and virtual men.⁶⁹

Among these latter skeptics are those that acknowledge that virtual identities have more "wiggle room" than material identities. Nonetheless, virtual identities are still captured by the same patterns that are used to organize social relations in material space.⁷⁰ Even Sherry Turkle, who advocates a fluid line between real and virtual identities, concedes that:

more men are willing to give virtual cross-dressing a try. But once they are online as female, they soon find that maintaining this fiction is difficult. To pass as a woman for any length of time requires

66. See Catharine MacKinnon, *Vindication and Resistance: A Response to the Carnegie Mellon Study of Pornography in Cyberspace*, 83 GEO. L.J. 1959, 1962 (1995) (explaining how "[p]ornography on computers is part of real life, not apart from it").

67. See ALLUCQUÈRE ROSANNE STONE, *THE WAR OF DESIRE AND TECHNOLOGY AT THE CLOSE OF THE MECHANICAL AGE* 83-97 (1995). Stone claims that:

If we consider the physical map of the body and our experience of inhabiting it as socially mediated, then it should not be difficult to imagine the next step in a profession toward the social—that is, to imagine the *location* of the self that inhabits the body as also socially mediated—not in the usual ways we think of subject construction in terms of position within a social field or of capacity to experience, but of the *physical* location of the subject, *independent* of the body within which theories of the body are accustomed to ground it

Id. at 92; see also Hall, *supra* note 65, at 158-63.

68. A well-known proponent of this view is Esther Dyson, the interim chair of the Internet Corporation of Assigned Names and Numbers and well-regarded Internet player, who asserts that:

gender is less noticeable in our interactions on line; what are noticeable are the words on the screen: does this person make sense? . . . Yes, there are filtering tools and there are certain people many people filter out. But that usually has to do with content, not gender.

On line, I'm sure some people may filter me out, but it doesn't happen the way it does off line—unconsciously. Yes, people may discount what women write, but they are more likely to read it.

Esther Dyson, *The Sound of the Virtual Voice*, N.Y. TIMES, May 16, 1999, § 6 (Magazine), at 44; see also Laura Miller, *Women and Children First: Gender and the Settling of the Electronic Frontier*, in *RESISTING THE VIRTUAL LIFE: THE CULTURE AND POLITICS OF INFORMATION* 49, 49 (James Brook & Iain A. Boal eds., 1995).

69. See Debra Michals, *Cyber-Rape: How Virtual Is It?*, MS., Mar.-Apr. 1997, at 68, 71 (explaining that "[w]omen either play the game or leave, which is hardly empowering").

70. See O'Brien, *supra* note 7, at 89 ("[G]ender policing [online] is considerable. The tacit agreement seems to be that crossing is acceptable—after all, this is a space in which one is supposed to experiment—but the motives for crossing must not involve an intent to 'deceive.'").

understanding how gender inflects speech, manner, and the interpretation of experience. Women attempting to pass as men face the same kind of challenge.⁷¹

These cultural patterns, learned in material spaces, may overdetermine virtual responses to gendered virtual identities and ultimately reinscribe gender hierarchy.⁷² In this context, "when transgendering does occur it is collectively interpreted in terms of allowable fiction, deceit, [or] pathology."⁷³ Virtual identity-shifting based on gender is not frictionless.

Although "passing" is a term that has been applied to crossing gender or sexual orientation boundaries as well as racial boundaries, Elaine K. Ginsberg points out that

[t]he genealogy of the term *passing* in American history associates it with the discourse of racial difference and especially with the assumption of a fraudulent "white" identity by an individual culturally and legally defined as "Negro" or black by virtue of a percentage of African ancestry. As the term metaphorically implies, such an individual crossed or passed through a racial line or boundary—indeed *trespassed*—to assume a new identity, escaping the subordination and oppression accompanying one identity and accessing the privileges and status of the other.⁷⁴

Trespass suggests a movement into identities that are off-limits because of their superior social status. Indeed, the examples of *Mulan* and *Shakespeare in Love* illustrate the incentives for passing from female to male identity.⁷⁵ Passing connotes secrecy, fraud and the specter of violence upon discovery, especially if the user wants to transmogrify against the normative desire of the dominant group to maintain a firm identity boundary line, typically in order to guard the benefits of being a member of that group.

The meaning of passing may be challenged and expanded by Internet identity-shifting as exemplified by a male therapist by the name of Sanford Lewin who signed onto a CompuServe chatline in the early 1980s under the name of Julie Graham.⁷⁶ When the identity of Julie Graham's material self was revealed to the women's discussion group in which Julie's virtual identity had

71. TURKLE, *supra* note 37, at 212.

72. See O'Brien, *supra* note 7, at 90 (positing that people are often assumed to be of a certain gender based upon whether their communication style is adversarial and competitive or consensus-seeking and mutually supportive).

73. *Id.* at 100.

74. Ginsberg, *supra* note 17, at 2-3 (emphasis in original).

75. See *supra* text accompanying notes 58-61.

76. See STONE, *supra* note 67, at 64, 70-81.

operated, “some of the women did not bounce back with forgiveness. At least one said that she felt a deep emotional violation which, in her opinion, was tantamount to sexual assault.”⁷⁷ Lewin passed successfully as Julie Graham for a while, but ultimately could not maintain the deception permanently.⁷⁸ And if passing connotes not only deception, but also deception for the sake of obtaining benefits not obtainable in one’s material identity category, then Lewin did not pass. For if the movement from female to male is an upward one in terms of social status, then Lewin’s movement from male to female is a demotion, at least in terms of the social resources that female bodies generally signify relative to male bodies.⁷⁹

Yet, arguably, passing on the Internet is not only more commonplace but also encompasses a wider variety of behavioral motivations than does passing in material space. Passing may be as temporary as a single chat room conversation. Men like Lewin may pass as women on the Internet to enhance sexual or social opportunities, although that choice would be relatively more rare in material space. Women may pass as men with no particular benefit in mind, but simply to experience what it might be like to “be” male. Members of racial minority groups may pass involuntarily as White, without really intending to; passing may be imposed upon them by the cultural assumptions of other users, in ways that would be impossible in material space abundant with physical signifiers. Whereas passing in the material world typically includes active deceit and/or desire to access privileges, passing on the Internet conceivably may not include either.

In contrast to passing, assimilation connotes mutual consent or at least mutual accommodation (by both the one choosing to assimilate and the group into which the person assimilates) rather than disguise or fraud. The racial assimilationist strategies of some ethnic groups such as Irish Americans have been one way in which others such as Asian Americans have been “raced”—by reference to the latter’s inherent unassimilability—into a negative non-White social standing.⁸⁰ Similarly, the relative ability of some Asian Americans to

77. *Id.* at 78.

78. *Id.*

79. Professor Kellye Testy comments that passing may be for the sake of avoiding negative social consequences rather than grasping social benefits. For example, passing from a gay to straight sexual identity may be for the purpose of not getting hurt or being an outcast. Or it could be viewed as a strategy to obtain the privilege of “irrelevance” with respect to sexuality. Sanford Lewin was apparently motivated by the greater depth and openness of conversation that he was able to have with women when they believed he was female. *See id.* at 70. This points to the fact that although the overall social status of women is lower than men, there may be specific reasons why a person may “pass” into a lower status. *See* Ginsberg, *supra* note 17, at 4-5.

80. *See* Kathleen Neal Cleaver, *The Antidemocratic Power of Whiteness*, 70 CHI-KENT L. REV. 1375, 1384 (1995). Neal Cleaver states:

The Irish immigrants’ fierce appropriation of whiteness provides the paradigmatic case

assimilate partially into the dominant racial paradigms, in circumstances such as access to higher education, allows the further distancing of racialized groups such as African Americans from the status of Whiteness.⁸¹ And although female bodies are visibly marked as different from male bodies, some women can assimilate culturally into male-dominated professions such as law by discarding female cultural markers and adopting male ones.⁸² An example of this, as explained by Professor Lani Guinier, might be the socialization of women law students into the combative verbal style of some male lawyers, despite the fact that many of these women feel that this style is alien to them.⁸³ In the context of the Internet, it is noteworthy that Asian Americans have a higher percentage of Internet access than even White Americans.⁸⁴ The overall percentage of Asian Americans in the general U.S. population is low—only 3.5%—and therefore, this increased access does not translate into a large absolute number of Asian American Internet users. However, the relatively high access of this group to the Internet suggests that, despite differences in language, culture, and so on, it might be assimilating into dominant digital race identities.

Whether by passing (fraud) or by assimilation (mutual agreement), virtual identities are constrained by shared social experiences, although the expectations might be somewhat different from those we have of material identities. Implicit in the very idea of a deceptive category of Internet identity is a normative boundary of acceptable social behavior. Moreover, identity on the Internet may be more constrained than one might predict by the relatively greater freedom to pass or assimilate.

Jodi O'Brien suggests

study for Roediger's theory. Early in the nineteenth century, it was an open question among the native born white Protestants whether these Celtic immigrants belonged to the white race. Vilified, segregated, excluded and castigated, the "paddy" was believed to be an inferior race.

Id.

81. See, e.g., Kang, *supra* note 15, at 1165 (discussing competition among racial groups that may be lessened by greater inter-racial social contacts in cyberspace).

82. See Lani Guinier, *Of Gentleman and Role Models*, in CRITICAL RACE FEMINISM: A READER, *supra* note 13, at 73, 73 (recounting her experiences as a law student at Yale where her Corporations professor greeted the class daily with "Good morning, gentlemen," as a marker for the way in which women were accepted into the White male paradigm of legal training, so long as they conformed to the paradigm).

83. *Id.*

84. See National Telecomm. & Info. Admin., *Falling Through the Net: Defining the Digital Divide: A Report on the Telecommunications and Information Technology Gap in America: Internet Access and Usage* (last modified Nov. 1999) <<http://www.ntia.doc.gov/nitahome/fttn99/contents.html>> (documenting the widening gap between the "haves" and the "have nots" in access to telecommunications and information technology).

that when persons enter cyberspace they bring with them preformulated cultural scripts which they use to map the new territory. In other words, we use existing cultural representations to give meaningful order to uncharted netscapes. As social creatures, our maps or scripts consist primarily of categories for defining and distinguishing self and other and the context for interaction. The categories of distinction, once established in the collective conscience, become social institutions. . . . [I]t is theoretically implausible that the charting of the new frontier of cyberspace will consist of original forms. Rather the forms of interaction will be shaped by the existing scripts which we will carry over into this realm as the only means that we know for organizing interaction.⁸⁵

The scripts we have learned in order to organize information in material space shape our organization of information in virtual space. These existing scripts are not wholly unchangeable on-line, but they do act as a limit.

It is possible to enact and negotiate . . . re/degendering through interactions with others. And it may be the case that this is easier to accomplish online. But this does not mean that an institutionalized gender binary—and its consequences—will necessarily cease to exist. Rather the act of transgressing the binary may in fact reinscribe it.⁸⁶

O'Brien suggests that the Internet does not and cannot mediate all the difference between virtual identity and material identity.⁸⁷ When a virtual identity collides with material identity in a way that cannot be resolved easily in physical space, or in ways that are unfamiliar to other virtual users, then Internet social relations tend to revert to ones that are grounded in material practices.⁸⁸ Thus passing, assimilation, or other forms of movement across Internet identities, whether gender or race, always carry within them the potential of reversion into social relations that pre-figure the virtual self. This is often combined with Andrew Shapiro's concept of "oversteer," in which users control the type of information that construct their virtual environments (and may choose information that challenges their belief systems the least).⁸⁹ O'Brien's feminist analysis of cultural scripts predicts that virtual gender relations will resemble strongly the dominant social relations organizing material identities—and in fact may reinforce rather than disrupt the latter. I term this the "reversion effect."

85. O'Brien, *supra* note 7, at 95.

86. *Id.* at 99.

87. *See id.*

88. *See id.*

89. *See* SHAPIRO, *supra* note 8, at 104.

Moreover, virtual practices may turn into physical acts, and therefore women are at risk for the kind of virtual activity that turns into actual violence against their materially gendered bodies. Several recent examples involving gender demonstrate this direct connection between violence in the virtual world and ensuing violence in the material world. In October 1999, Liam Youens shot and killed Amy Boyer, a young woman whose personal information, such as where she worked, he found through on-line research services.⁹⁰ Moreover, he maintained websites that documented his plan to kill her.⁹¹ In March of 1998, a Columbia University graduate student was charged with kidnapping and torturing a Barnard student with whom he had communicated extensively through the Internet.⁹² These examples remind us that the boundaries between virtual space and non-virtual space are highly permeable.

The cyberfeminist analyses also remind us that the boundaries of gender, whether virtual or real, are still highly impermeable—what I call the “boundary evaluation problem.” Boundaries have not been erased because of the Internet, but they are sometimes more difficult to articulate. In some instances, the direct link between acts on the Internet and acts in the real world is obvious.⁹³

The extravagant claim that digital networked technology will render gender identity irrelevant is refuted by analyses of gender boundary-crossings. Different flavors of cyberfeminist analyses have led to the same conclusion: that the vulnerability of materially gendered identities acts as a precursor to virtual gender crossings. Even so-called pro-sex feminists—feminists who believe that “sex and sexual expression are political, and that opportunities to discuss . . . sexual identities are crucial to feminism’s

90. N.H. *Killer Stalked Victim on Web* (visited May 8, 2000) <<http://www.nytimes.com/aponline/a/AP-Internet-Murder.html>>.

91. *Id.*

92. See David Rhode, *Order for New Sex-Abuse Trial Is Called Threat to Women's Rights*, N.Y. TIMES, Dec. 23, 1999, at A1 (discussing the impact on rape shield laws of ordering a new trial so that the jury could consider e-mails the accuser sent to the victim discussing her interest in sadomasochism); John Sullivan, *Ambiguous Trail of E-mail Is at Heart of Torture Case*, N.Y. TIMES, Mar. 23, 1998, at A16 (discussing the difficulty of interpreting ambiguous e-mails sent between the accuser and the alleged attacker).

93. For example, in February of 1999, a Portland federal jury awarded \$107.9 million to abortion doctors who were targeted by an anti-abortion website entitled “The Nuremberg Files.” See Lauren Dodge, *Jury Rules Against Anti-Abortion Website* (visited Aug. 4, 1999) <<http://www.archives/seattletimes.com/cgi-bin/texis/web/vortex/browse>>. The district court ruled that the website constituted “true threats” that were not protected by the First Amendment because, in part, three abortion doctors whose names appeared on the website’s list of “baby butchers” had been killed and their names on the website subsequently crossed out. See *Planned Parenthood v. American Coalition of Life Activists*, 945 F. Supp. 1355, 1362 (D. Or. 1996) (describing the deadly dozen list on the website). One of the plaintiffs who testified at trial, Dr. Elizabeth Newhall, testified that “she began wearing disguises and a bulletproof vest” after she was put on the list. See Sam Howe Verhoek, *Anti-Abortion Site on Web Has Ignited Free Speech Debate*, N.Y. TIMES, Jan. 13, 1999, at A1. Although women physicians may not have been the “protestor’s” primary targets, abortion is obviously a highly contested issue related to gender and a site of gender-related violence.

strength”⁹⁴—acknowledge the material constraints to the freedom of expression that they advocate.⁹⁵ Similarly, feminist advocates of a strong First Amendment understand the importance of analyzing the degree of freedom deriving from virtual gendered identities.⁹⁶ At the end of a tour of on-line women’s communication, linguist Kira Hall, quoting virtual reality pioneer Rosi Braidotti, concludes:

“[o]ne of the great contradictions of cyber-images is that they titillate the imagination, promising marvels and wonders of a gender-free world or a multi-gender world; and yet, such images not only reproduce some of the most banal, flat images of gender behavior imaginable, they intensify the difference between the sexes.” The same is true of computer-mediated communication; rather than neutralizing gender, the electronic medium encourages its intensification.⁹⁷

Through the relatively robust work on virtual gender interactions on the Internet, we can draw some parallels to what might occur with respect to virtual race.

B. Race

Material identities of gender and race hierarchically organize social resources in many if not most physical realms. In the digital age, income disparities in the United States, already troublesome, have increased to the point where the top one percent of the population (2.7 million people) will have as many after-tax dollars to spend as the bottom 100 million.⁹⁸ Income level is a strong determinant of Internet access, so that in 1999, urban households earning incomes over \$74,000 (the top fifth of income earners)⁹⁹ are twenty times more likely to have home Internet access than rural households at the

94. See Sarah Chester, Note, *A Feminist Response to the Exxon Bill*, 8 HASTINGS WOMEN’S L.J. 79, 80 (1997) (arguing that the Communications Decency Act and other attempts to regulate communication on the Internet are disempowering to women who gain power by being able to discuss sexual issues via the Internet).

95. *Id.* at 109.

96. See Anne Wells Branscomb, *Anonymity, Autonomy and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639, 1653 (1994). “Clearly, if there exists a genuine impact outside the electronic community with detrimental consequences within the local community, as when local children are used as models in online pornography, geographical jurisdictional rules should apply.” *Id.*

97. Hall, *supra* note 65, at 167.

98. See David Johnston, *Gap Between Rich and Poor Substantially Wider*, N.Y. TIMES, Sept. 15, 1999, at A14.

99. *Id.*

lowest income levels.¹⁰⁰ The so-called “digital divide” between White and Black (as well as White and Latino) widened dramatically—by over thirty percent—in the one year period between 1997 to 1998.¹⁰¹ At this moment in Internet time, disparities in Internet access based on material racial identity are readily identifiable.¹⁰² Predictably, single parent households, particularly female-headed, have less access than other households.¹⁰³ Presumably, female minority-headed households have the least access of all.

Those Americans enjoying the greatest connectivity today are typically high-income households. Holding income constant, other highly-connected groups include Whites or Asians, middle-aged, highly-educated, employed, and/or married couples with children, most often found in urban areas and the West. Conversely, the least connected generally are low-income, Black, Hispanic, or Native American, senior in age, not employed, single-parent (especially female-headed) households, those with little education, and those residing in central cities or especially rural areas.¹⁰⁴

When holding race constant, it is clear that family composition can still have a significant impact on Internet access. Overall, dual-parent White families are nearly *twice* as likely to have Internet access as single-parent White households (44.9% versus 23.4%). Black families with two parents are nearly *four times* as likely to have

100. The impact of income on Internet access is evident even among families with the same race and family structure. National Telecomm. & Info. Admin., *supra* note 84. Among similarly-situated families (two parents, same race), a family earning more than \$35,000 is two to almost six times as likely to have Internet access as a family earning less than \$35,000. *Id.* at chart I-29. The most significant disparity is among Hispanic families: two-parent households earning more than \$35,000 are nearly *six times* as likely to have Internet access as those earning less than \$35,000. *Id.*

101. *Id.* at chart II-3 (explaining how minorities are losing ground even faster with regard to Internet access). “Between 1997 and 1998, the gap between White and Black households *increased by 37.7%* (from a 13.5 percentage point difference to a 18.6 percentage point difference), and *by 37.6%* (from a 12.5 percentage point difference to a 17.2 percentage point difference) between White and Hispanic households.” *Id.* at chart I-23 (emphasis in original).

102. *Id.* at charts I-13, I-22 (stating how “race also influences connectivity”).

Unlike telephone penetration, however, households of Asian/Pacific Island descent have the clear lead in computer penetration (55%) and Internet access rates (36.0%), followed by White households (46.6% and 29.8%, respectively). Black and Hispanic households have far lower PC penetration levels (at 23.2% and 25.5%) and Internet access levels (11.2% and 12.6%).

See National Telecomm. & Info. Admin., *supra* note 84. But see Jube Shiver, Jr., *Internet for Everyone? Some Say It's Already Happened*, SEATTLE TIMES, Jan. 29, 2000, at A2 (reporting that many studies have shown that the “digital divide” is closing rapidly).

103. See National Telecomm. & Info. Admin., *supra* note 84, at charts I-18, I-26.

104. *Id.*

Internet access as single-parent Black households (20.4% versus 5.6%). And, children of two-parent Hispanic homes are nearly *two and a half times* as likely to have Internet access as their single-parent counterparts (14.0% versus 6.0%).¹⁰⁵

The relative silence about race in the face of vast discrepancies in material resources, such as basic access to the technology discussed here, shows on one level why race matters¹⁰⁶ on the Internet, even though, paradoxically, it may seem not to matter. As the preceding statistics demonstrate, one's material racial status in the physical world predicts whether one is able to participate consistently in the digital dialogue. Thus material racial identities are linked to virtual racial identities, in ways that support and indeed maintain the silence surrounding the topic of race.

On a less apparent but just as significant level, the ideology of colorblindness ensures that many social activities are interpreted through a lens that demands the superficial erasure of a racialized other (either by coding that other as White, by casting the other out of the community as "deviant," or by imposing a distorting sameness on racial differences), rather than the recognition of the complex social responses elicited by materially racialized bodies.¹⁰⁷ Whiteness is the predominant racial norm on the Internet, as it is heavily dominated by users in North America and Western Europe, as well as those who have English-language ability and whose socio-economic status is at the top of the world's population. Two 1996 studies show that the United States and other English-speaking countries account for more than three quarters of the Internet computer host sites.¹⁰⁸ European host sites account for another eighteen percent, although presumably not all of those sites are English-language.¹⁰⁹ Digital cultural norms also encourage textual choices such as the fluidity of "noms de 'net," which in turn tend to downplay racial identifiers such as appearances, accents or surnames. Another compelling reason for the dominance of a White virtual race is that it represents a higher status compared to other racial categories (material, virtual or otherwise). Critical race theory, and by extension critical race feminism, claim that "racism is a pervasive, resilient phenomenon"¹¹⁰

105. *Id.*

106. See generally CORNEL WEST, RACE MATTERS (1994) (discussing how race affects or influences the behavior and actions of individuals within society).

107. *Id.*

108. See Foley & Sutton, *supra* note 11, at 21.

109. *Id.*

110. MARI J. MATSUDA, *Critical Race Theory, in WHERE IS YOUR BODY?: AND OTHER ESSAYS ON RACE AND GENDER IN THE LAW* 47, 52 (1996) (responding to Professor Kimberlé Williams Crenshaw's call for a critical theory of race and law, advocating critical race theorists to recognize law

The lack of universal access is one manifestation of inequality and injustice—a type of discrimination based on systematic, structural exclusion of one group from the benefits afforded other groups. But it is not the central focus of this paper. Instead, in the next section, I attempt to trace some of the consequences of not paying attention to race and gender, and how the lack of attention affects our interpretation of individual acts of invidious discrimination, as well as acts of group oppression that inflict long-lasting trauma on group members.¹¹¹ The race controversies represented in acts of harassment, threats and hate crimes on the Internet raise the question of whether the fluidity of virtual race compared to material race can or will positively impact on material racial inequalities.

IV. TOWARD A CRITICAL RACE FEMINIST CRITIQUE OF THE INTERNET

While gender and race function in many similar ways to distribute social resources, there are also some obvious differences between these two categories that become apparent in the context of digital technologies. It is crucial to remember that the ideology of colorblindness combined with the racial divide in access to digital technologies, make the analysis of racial discrimination through virtual identities complex and difficult to trace. This is quite apparent, for example, in the plethora of feminist analyses of the Internet, compared to the relative dearth of analyses based on race. It is supported by the greater number of reported experiences of “reverse passing” on the Internet, that is, males explicitly adopting a female virtual identity, than reported for virtual identities based on race.¹¹² And it is underscored by the popular and academic analyses of one of the Internet’s First Amendment causes célèbre—the so-called Jake Baker case¹¹³—in which gender was over- and race was under-analyzed. Colorblindness tends to mark virtual race as White; however, virtual gender differences, as discussed in the previous section, are maintained and even exaggerated.

as “an enforcer of racist maldistributions of race and power” while working within the law to utilize it as a tool of progressive social change).

111. *Id.*

112. Professor Jerry Kang experimented with race crossing by adopting an avatar with dark skin. See Kang, *supra* note 15, at 1133-36.

113. See *United States v. Baker*, 890 F. Supp. 1375 (E.D. Mich. 1995) (granting Baker’s motion to quash indictment because of his e-mails to a victim did not meet the requirements of “true threats” and were thus protected by the First Amendment), *aff’d sub nom. United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997).

Virtual racial identity, coded as White, reflects material social practices in many ways.¹¹⁴ My focus in this section is on a few early responses by the formal legal system to disputes generated on or by the Internet by virtual race and gendered race.¹¹⁵ These case studies lead to a tentative conclusion that when race does erupt out of the dominant White virtual norm, it defines social boundaries in ways that differ little from social relations in material space. For example, I have written elsewhere about how the Internet facilitates global marriage markets, which affirm and even depend upon the reduced political, social and economic status of women of color to exist.¹¹⁶

The legal system has begun to respond to pornography,¹¹⁷ harassment, threats and hate crimes on the Internet—domains that in the material world deeply implicate or are implicated by both race and gender power relations. Legal responses to these crises are a form of cultural and social activity, signaling information about race and other identities that are being regulated. On the one hand, race may be coded as White, and the racial component of activities perceived as “gender” crimes may be overlooked or lost, as discussed below with respect to the so-called Jake Baker case.¹¹⁸ On the other hand, race may be used as a way to code non-White deviance as in prosecutions involving color-on-color threats, discussed below in the context of the successful hate crime prosecutions of Richard Machado and Kingman Quon.¹¹⁹ Encouraged by the general cultural ideology of colorblindness, the issue of threats to those with minority racial identities then becomes one of managing the criminal fringe element that seeks to make race an issue when it should be a non-issue.

114. For example, the symbolism of Microsoft’s Office Suite as white collar and therefore White reflect the material bias of users and software developers whose material racial identity is White. Sally Anne Payton & Jamy Sheridan, *Whiteness at the Interface: Race and Technology*, Presentation at the Fourth Annual Ethics and Technology Conference, Boston College (June 4-5, 1999).

115. The “data” in this essay is provided by legal cases, the published encounters between formal legal regulation and established virtual identities.

116. See generally Chon, *supra* note 14, at 143 (arguing that the Internet often perpetuates existing inequalities).

117. Pornography is beyond the scope of this paper. However, the plethora of pornographic websites with sexual images of racialized men and women, produced for a White gaze, implicates virtual race and material race. For example, Asian American women are portrayed as compliant sexual objects. See Peter Kwan, *Invention, Inversion and Intervention: The Oriental Woman in The World of Suzie Wong*, M. Butterfly and The Adventures of Priscilla, Queen of the Desert, 5 *ASIAN L.J.* 99, 102 (1998); see also Lisa C. Ikemoto, *Male Fraud*, 3 *J. GENDER RACE & JUST.* 511, 516-22 (2000).

118. See *Baker*, 890 F. Supp. at 1375 (holding that e-mails about raping and torturing young girls were not sufficiently unequivocal, conditional immediate and specific to convey the requisite intent necessary to prosecute the defendant).

119. See *United States v. Machado*, 195 F.3d 454 (9th Cir. 1999) (affirming Machado’s misdemeanor conviction for interference with federally protected activities in violation of 18 U.S.C. § 254(b)(2)(A)); *Student Handed Two-Year Prison Sentence for Threatening E-Mails* (visited June 29, 1999) <<http://www.canoe.ca/CNEWS/home.html>> (stating that Quon plead guilty to seven misdemeanor counts of interfering with federally protected activities).

The prosecution of hate crimes, while important to people of color upon whose bodies the violence of racism is enacted, over-emphasizes the containment of a particularly virulent form of racism, while leaving much racial discrimination by respectable folks unrecognized. Race controversy can be generated not only through individual acts of bigotry, but also when

members of different groups seeking to live together peaceably and work together politically who are stymied by the continuing effects of racial wounds inflicted by one group's participation in public or private systems subordinating the other. . . . [This involves] sometimes sharp, oftentimes mundane deployment of subordinating social, economic, and political structures.¹²⁰

The problems of oversteer, reversion effect and boundary evaluation apply as much here as they do to gendered virtual identities. To complete the analysis of race, however, the question of intra-minority harassment, threats and hate crimes must be examined as a type of racial discrimination based upon unresolved intra-minority racial group tensions. In addition, a critical race feminist perspective must ask: Where are the voices of women of color? Have they been articulated by White feminists or by men of color?

The first of three hate crime cases deeply implicates courts as sites of cultural performance and criminal statutes as cultural scripts. Jake Baker was indicted for the interstate transmission of threats,¹²¹ an extremely open-ended and potentially broad-reaching criminal statute. The original indictment returned against Baker had been based on a graphic snuff story written by Baker, featuring one of his classmates and referring to her by name.¹²² The superseding indictment was based instead on various e-mail messages that law enforcement authorities found when they seized Baker's computers and searched them with his permission after his arrest.¹²³ Stored messages on this computer, sent to Arthur Gonda in Canada, described Baker's plans to stalk, abduct and rape teenage girls and young women.¹²⁴

The district court eventually dismissed the superseding indictment, based on its analysis that Baker's e-mails were not true threats¹²⁵ and therefore the

120. YAMAMOTO, *supra* note 46, at 85.

121. See 18 U.S.C. § 875(c) (1996). "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both." *Id.*

122. *Baker*, 890 F. Supp. at 1379.

123. *Id.* at 1379 n.4.

124. *Id.* at 1387-89.

125. *Id.* at 1379, 1390.

indictments violated the First Amendment.¹²⁶ The Sixth Circuit affirmed the dismissal on other statutory grounds.¹²⁷ Here I focus on the content of the messages with respect to their representations of women rather than whether they constituted a threat¹²⁸ or a “true threat” unprotected by the First Amendment.

While much was made of Baker’s obsession with young girls by the prosecutors, courts and commentators, very little has been written about the identity of Arthur Gonda, who was the other party in this e-mail exchange.¹²⁹ Gonda’s material identity was never discovered.¹³⁰ From a legal standpoint, Gonda’s identity was terribly significant because he was the recipient of these messages. The district court ruled (and the majority of the Sixth Circuit panel agreed) that the question whether the e-mail was threatening had to be answered by reference to “how a reasonable person would expect Gonda to interpret the e-mail messages.”¹³¹ In order to determine how the recipient would have reacted to the e-mail messages, the courts had to make assumptions about Gonda’s gender, race and age, among other characteristics.

The district court found that Arthur Gonda would not have been threatened by Baker’s e-mail messages describing violent sexual acts.¹³² In so finding, the court was well aware of the fact that Arthur Gonda’s material identity, whether framed in terms of gender or age, was not clear, and that identity-shifting seemed to be a common feature of Internet communication:

The focus of the inquiry here, therefore, is how a reasonable person would expect Gonda to interpret the e-mail messages. Gonda’s identity is entirely unknown; “he” could be a ten year old girl, an eighty year old man, or a committee in a retirement community playing the role of Gonda gathered around a computer. All that is known about Gonda is that he used a computer account based in Ontario, Canada, and that he apparently enjoyed exchanging with Baker what he referred to in an e-mail message dated January 3, 1995, as “REAL sex talk” concerning violence against women and girls. . . . It would be patently unreasonable after reading his messages to think that Baker’s communications caused their only foreseeable recipient, Gonda, to fear violence, or caused him any disruption due to fear of violence. Of

126. *Id.* at 1390.

127. *United States v. Alkhabaz*, 104 F.3d 1492, 1492-96 (6th Cir. 1997).

128. *Id.* at 1495-96 (explaining what is considered a threat under the statute).

129. *Baker*, 890 F. Supp. at 1379.

130. *Id.* at 1386.

131. *Id.*

132. *Id.*

the grounds for prosecution of threats identified in *R.A.V.*, the only one that could apply here is protection from the possibility that threatened violence will occur.¹³³

The court took judicial notice of the fact that “[r]ole playing and adopting assumed identities is common in on-line communities.”¹³⁴

Apparently, by the use of the term “he” in quotes, the district court was willing to concede that Gonda could be a woman or even a ten year old “girl.”¹³⁵ Although Gonda’s virtual identity was manipulable in terms of gender or age, the court did not address the question of race.¹³⁶ This silence on the question of race by the court is remarkable, because Gonda actively introduced the element of race into the dialogue with Baker by articulating fantasies of violence against Asian Americans and Latinas. For example, the court’s own opinion contains this e-mail exchange:

*Hi Jake. I have been out tonight and I can tell you that I am thinking more and more about “doing” a girl. I can picture it so well . . . and I can think of no better use for their flesh. I HAVE to make a bitch suffer! . . . As far as the asian bitch story, there is only one possible ending. . . .*¹³⁷

Baker responded:

*Are [sic] tastes are so similar. it scares me :-) When I lay down at night[] all I think of before I sleep is how I’d torture a bitch I get my hands on. I have some pretty vivid near dreams too. I wish I could remember them when I get up.*¹³⁸

In another exchange duly recorded by the court, Gonda again introduces a racializing element to the sexual fantasy: *It’s always a pleasure hearing back from you . . . I had a great orgasm today thinking of how you and I would torture this very very petite and cute south american girl in one of my classes*
¹³⁹

133. *Id.* at 1385 (footnote omitted).

134. *Id.* at 1386.

135. *Baker*, 890 F. Supp. at 1386 n.17.

136. *Id.*

137. *Id.* at 1389.

138. *Id.* (explaining that Count IV, based on a message from Gonda to Baker, and Baker’s response, charged Baker and Gonda with transmitting a threat to injure). Both e-mail messages are dated December 10, 1994. *Id.*

139. *Id.*

Baker responded the same day: *Just thinking about it anymore doesn't do the trick . . . I need TO DO IT.*¹⁴⁰

Gonda replied the next day: *My feelings exactly! We have to get together. . . . I will give you more details as soon as I find out my situation. . . .*¹⁴¹

In addition to these quotes found in the official district court opinion, other parts of the record demonstrate the racializing aspect of Baker and Gonda's sexual fantasies. Baker refers to a "Lin-san" in his Japanese class, whom he describes as "a very young Korean (in my opinion, Korean girls are the hottest) girl who hasn't been to class in several weeks. No one knows where she is. It filled me with pleasure to think that someone like us has probably taken her, and raped and mutilated her."¹⁴² Other references to Asian American women by Baker include: "that oriental cunt," "little Asian cunt," "tiny asian bitch," and "the Asian whore."¹⁴³ Of all the commentators or participants in this case, which generated a storm of controversy, only Professor Catherine MacKinnon seems to have noticed or remarked upon the racial content of the e-mail exchanges.¹⁴⁴ The main thrust of her brief, however, was about the gender oppressive nature of these threats.¹⁴⁵

Interestingly, although Jake Baker's legal name is Abraham Jacob Alkhabaz, which is of Arab (specifically, Kuwaiti) origin,¹⁴⁶ his nom de 'net did not reveal any racializing information that might have been revealed had he used his actual surname. The Jake Baker case illustrates that a criminal prosecution that is framed as a "gender harassment" case could have been, but was not, constructed as a "race and gender harassment" case. It shows, almost to an extreme, how virtual race is coded as White. Despite the substantial data, including the material race of the defendant himself, race was not raised in connection with the analysis of Gonda's concededly unknown identity. Race was not linked to the possible victims. Race was not even attached to the defendant, who had a material as well as virtual presence.

140. *Baker*, 890 F. Supp. at 1389.

141. *Id.* (explaining that Count V charged Baker and Gonda with transmitting a threat to injure). It is based on an exchange between Gonda and Baker on December 11-12, 1994. *Id.*

142. Catherine MacKinnon, *Brief for Appellant, United States v. Alkhabaz* (visited June 11, 1999) <<http://www.nostatusquo.com/ACLU.Porn/Baker/arg2a2/html>>.

143. *Id.*

144. *Id.* I reviewed all the pleadings submitted by the parties and amicae, every law review article that referred to this case, on-line newspaper articles, and websites and Professor MacKinnon was the only person who noticed the racial content.

145. *Id.*

146. The only reference I could find to this aspect of race in the case was in an on-line story apparently written by a student. Adam S. Miller, *The Jake Baker Scandal: A Perversion of Logic*, TRINCOLL J. 1, ¶ 4 (June 11, 1999) <<http://www.trincoll.edu/~tj/tj4.6.95/articles/baker.html>> (arguing that the uproar over *Baker* reflected a disturbing lack of regard for free speech rights).

At the other extreme, the two federal prosecutions for race-based Internet threats illustrate how race, once it erupts into virtual spaces, can be hyper-realized. Both *United States v. Machado*¹⁴⁷ and *United States v. Quon*¹⁴⁸ were prosecutions brought in California based on federal civil rights statutes against university students who had sent e-mail messages to targeted racial minority groups. They both involved defendants who were themselves racial minorities. The court convicted Machado, a naturalized American from El Salvador,¹⁴⁹ of interfering with the civil rights of Asian American students to attend a publicly supported university.¹⁵⁰ The content of his message to fifty-nine students with Asian surnames at University of California-Irvine was as follows:

From: "Mother F—ker (Hates Asian)" <mf—ker@uci.edu>
Subject: F—k You/Asian Sh-t

Hey stupid f—ker

As you can see in the name, I hate Asians, including you. If it weren't for asians [sic] at UCI, it would be a much more popular campus. You are responsible for ALL the crimes that occur on campus. YOU are responsible for the campus being all dirt. YOU ARE RESPONSIBLE That's why I want you and your stupid ass comrades to get the fuck out of UCI. If you don't I will hunt all of you down and Kill your stupid asses. Do you hear me? I personally will make it my life career [sic] to find and kill everyone one [sic] of you personally. OK??????? That's how determined I am.

Get the fuck out,
Mother F—ker (Asian Hater)¹⁵¹

147. *United States v. Machado*, 195 F.3d 454, 455 (9th Cir. 1999).

148. See Rebecca Fairley Raney, *Charges Filed in U.S. Hate E-Mail Case*, CYBERTIMES (Jan. 29, 1999) <<http://www.nytimes.com/library/tech/99/01/cyber/articles/29mail.html>> (explaining the California decision regarding Kingman Quon, a 22-year-old man accused of sending death threats to 100 Hispanic people by e-mail).

149. See Jon Swartz, *Sentencing Not Likely to Curb Hate on Net*, S.F. CHRON., Feb. 13, 1998, at B1 (stating that Internet sites preaching racist and White supremacist messages will remain protected under the First Amendment absent an immediate physical threat to specific individuals).

150. See *Cyberthreats: California Verdict Makes Sense*, MINNEAPOLIS-ST. PAUL STAR-TRIB., Feb. 18, 1998, at 14A (arguing that the *Machado* conviction is consistent with the American Historical legal tradition that protects free speech up to the point of "serious, credible, and specifically targeted threat of violence, or infringements on the civil rights of others").

151. See NATIONAL ASIAN PAC. AM. LEGAL CONSORTIUM, *AUDIT OF VIOLENCE AGAINST ASIAN PACIFIC AMERICANS* 26 (1997) (on file with author).

In reverse symmetry, a court charged Kingman Quon, a Taiwanese-born Asian American student, with civil rights violations for sending death threats to 100 Latina/os by e-mail.¹⁵² Ironically, Quon was himself a student at a California public university.¹⁵³ Quon also sent these threats to forty-two professors at California State University in Los Angeles, twenty-five students at M.I.T., as well as to people at Indiana University, Xerox Corporation, the Texas Hispanic Journal, the Internal Revenue Service, and NASA's Ames Research Center.¹⁵⁴

How might a critical race feminist framework explain these three expressions of racial hatred? If one premise of this paper is that racism is a fundamental feature of the American social landscape, ubiquitous even if coded in certain environments as White, then the Jake Baker example illustrates that coding race as White leads to the erasure of women of color as victims. If one tenet of critical race feminism is that women of color are "invisibilized" by their placement at the intersection of two different oppressive structures (gender and race), then the theory predicts why no one notices or comments upon Asian women as victims in all three of these incidents.¹⁵⁵ They may be multiply harmed by their location at the bottom of two hierarchies (as a female within male patriarchy, and as a racial minority in a context of White supremacy), but the formal legal focus is on gender and not race. Coding virtual race as White results in women of color being harmed not only by the actual hateful conduct, but also by the lack of attention to their victim status.

While all three case studies confirm that one's material race still puts one at risk for certain kinds of violence, the Quon and Machado prosecutions illustrate that ethnic surnames in e-mail addresses can mark the virtual "other," and disrupts what might otherwise be a seamlessly monoracial environment. Moreover, if hate speech is rampant on the Internet by those who material identity is White,¹⁵⁶ the prosecution of these three men of color as perpetrators can be explained in part by the same forces that explain over-prosecution of

152. See Raney, *supra* note 148.

153. *Id.*

154. *Id.*

155. See Mary Louise Fellows & Sherene Razack, *The Race to Innocence: Confronting Hierarchical Relations Among Women*, 1 J. GENDER RACE & JUST. 335, 340 (1998) (arguing that women's different claims to subordination, or "competing marginalities," as a strategy used to criticize hierarchies in a "race to innocence," fail to take into account women's participation in hierarchies that are inevitably interrelated).

156. See, e.g., Swartz, *supra* note 149, at B1 (quoting David Duke, a former Ku Klux Klan leader, who stated that "the Net allows me to present scientific data on the physical differences between races while continuing my political career").

men of color for non-Internet crimes.¹⁵⁷ Of course, because Alkhabaz, Machado and Quon were arguably articulating direct violence against others, their communications were less protected by the First Amendment, and thus were easier targets of criminal prosecution for threatening speech. Still it bears noting that the vast majority of hateful racist speech on the Internet is perpetrated by those whose material race is White. "They peddle hatred to children, with a brightly colored Web page featuring a coloring book of white supremacist symbols and a crossword puzzle full of racist clues," begins one story about a racially-motivated killing spree in July 1999.¹⁵⁸ The World Church of the Creator and other White supremacy groups recruit through websites.¹⁵⁹ Although no incident of racially-motivated assault or murder has been directly attributed to these sites, their proliferation has alarmed traditional watch-dog groups such as the Anti-Defamation League.¹⁶⁰ The demand for Internet addresses that convey hate messages is so great that in late 1999, one was auctioned over the Internet at a minimum bid of \$1 million.¹⁶¹ In 1997, civil rights groups estimated the number of hate-based websites at 300.¹⁶² In 1998, the number was estimated at 800.¹⁶³ In that same year, David Duke's website recorded 2000 hits and 200 e-mail messages daily.¹⁶⁴ These websites do not necessarily advocate direct violence. However, the methods of overtly White supremacist groups have changed, so that they may advocate indirect or

157. See, e.g., *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (involving the prosecution of a Black defendant for a hate crime). Of course, the fact that Machado and Quon could be prosecuted under federal civil rights laws protecting minority access to public education, the directness of their threats, as well as the fact that they targeted their e-mail messages to specified racial minority groups, are factors as well.

158. See Pam Belluck, *A White Supremacist Group Seeks a New Kind of Recruit*, N.Y. TIMES, July 7, 1999, at A1 (discussing the connection between the World Church of the Creator and Benjamin Nathaniel Smith's racist shooting spree in Indiana and Illinois during the Fourth of July weekend in 1999).

159. *Id.*

160. See Marcia Stepanek, *Civil Rights Web Site to Fight Hate Speech Online*, NEW ORLEANS TIMES-PICAYUNE, Nov. 25, 1997, at F12 (highlighting the formation of a World Wide Web site to "promote diversity and provide information to counter hate crimes," and respond to the proliferation of "hate messages and propaganda" via websites and e-mail).

161. See Mark Leibovich, *Online Auction Stopped Because of Hateful Name*, SEATTLE TIMES, Dec. 15, 1999, at A16 (reporting online auctioneer eBay's refusal to allow a seller named "animus" to sell the rights to an Internet address containing a slur against African Americans).

162. See Stepanek, *supra* note 160, at F12.

163. See Swartz, *supra* note 149, at B1 (estimating that the number of hate sites online has doubled to 800 since 1996).

164. *Id.*

covert violence.¹⁶⁵ Their antisocial behavior is noticed *more* than if perpetrated by non-minority men.

In other words, the racial scripts on the Internet, spilling over into law, reflect the underlying cultural scripts about race. Asian women are highly sexualized objects of male aggression, whose injuries are noticed less than if enacted upon White bodies. Men of color are more violent and thus require more legal disciplining than White men. When race disrupts the racelessness of the Internet in the context of pornography, harassment, threats and hate crime, it does so in ways that reinforce or even magnify the differences that race makes in the real world. Formal legal acts and edicts also reflect and construct these social categories and inequities.

Are Alkhabaz, Machado and Quon—Arab American, Latin American and Asian American, respectively—simply racists? Can their rhetorically violent bigotry against other minority group members be classified as an aberration, either within the dominant racial community or within minority communities? How do we make sense of their actions through a critical race feminist lens? The color-on-color nature of these interactions (all perpetrators and victims were members of racial minority groups) provides a central case study of what Professor Eric Yamamoto terms “racial group agency and responsibility.”¹⁶⁶ Drawing heavily on post-colonial and feminist legal theory, as well as the disciplines of theology, psychology and sociology, Yamamoto posits a theory of “simultaneity” in which

historically subordinated groups with a degree of newly acquired power sometimes situationally redeploy dominant structures of control and adopt oppressive attitudes toward subordinate other groups. The redeployment can occur even though the groups themselves remain objects of enmity and violence.¹⁶⁷

According to Yamamoto, the context of the social relationship in which racial power is exerted is crucial to understanding how and why that power is deployed.¹⁶⁸ In the case of Alkhabaz, Machado and Quon, the context is shaped strongly by the norms of electronic communication, in which anonymity of the user allows him or her to pass as White. For example, Alkhabaz became “Jake Baker” and Machado assigned himself the handle “Mother F—ker (Hates Asian).” It is important to note too, that these incidents took place on college campuses where, unlike the extreme racial segregation apparent in housing and residential patterns in the general population, students are forced to mix and

165. See Belluck, *supra* note 158, at A1 (describing the World Church of the Creator’s attempt to market itself to a moderate, mainstream audience).

166. See YAMAMOTO, *supra* note 46, at 98.

167. *Id.* at 110.

168. *Id.* at 115.

confront difference. Some recent reports suggest that people under thirty are actually less racially tolerant than older people.¹⁶⁹ It is crucial also to note that California, in which two of these incidents took place, is a hotbed of anti-immigrant sentiment, economic conflict among racial and ethnic groups, as well as violence that erupts as a consequence of neighborhoods such as Monterey Park becoming more "colored."¹⁷⁰ Political will to address these profoundly multiculturalist disputes has been notably lacking; instead there has been an insistent beat of minority scapegoating and "immigrant go home" sentiments. These structural explanations do not let those such as Quon off the hook. To the contrary, they deeply implicate all racial communities, minority or otherwise, in the creation of racially-organized power.¹⁷¹ Against the backdrop of White supremacy, racial minorities vie against each other for political, social and economic gain.

Thus virtual identities may cause all of us to reinforce difference rather than challenge ourselves to confront difference. And it is quite probable, then, when difference presents itself again in real life, it has been exacerbated by the digital context, as well as the digital divide, that constructs virtual race as White.

V. CONCLUSION

*Leftists tend to hate anything that has an image of being strong, good and successful. They hate America, they hate Western civilization, they hate white males, they hate rationality.*¹⁷²

*It's often dissed as "just" paper money. But these 40 guys (and, yes, they are all guys) have tons of it.*¹⁷³

169. See *Race-Study Findings Released Social Issues*, NORTHWEST CULTURE & HERITAGE OBSERVER, Sept. 1997, at 1 (stating that "Americans between the ages of 18 and 30 are more likely to hold anti-black views than members of the 'Baby Boom' generation between ages 30-49, said a study released by the Anti-Defamation League of B'nai B'rith").

170. See Keith Aoki, Presentation at the Nineteenth Annual National Asian Pacific American Law Students Association Conference (Sept. 1999) (outlining factors generating hate motivated violence, such as nativist backlash and "English-only" initiatives, fed by economic tensions in forcibly integrated White and immigrant neighborhoods, and the interconnections between racism, sexism and homophobia in furthering inequalities between groups).

171. As pointed out in the *Digital Divide*, Asian American households have the highest Internet access rates of any racial group in the United States. National Telecomm. & Info. Admin., *supra* note 84. Although beyond the scope of this paper, this has implications for the relative power this group has over others in the digital environment.

172. THEODORE KACZINSKI, UNABOMER MANIFESTO ¶ 15 (on file with author).

173. See Mark Borden & Suzanne Koudsi, *Young and Rich: America's Forty Richest Under Forty*, FORTUNE, Sept. 27, 1999, at 89 (reporting a list of the estimated 40 richest people in America's cyber-economy).

Why, one might ask, does material race still operate in a technological domain that is characterized by relatively more openness, freedom of mobility both vertically and horizontally, as well as decentralization of regulatory control, than in the physical world? The answer suggested by a critical race feminist perspective is that virtual and material race both operate to assign the material privileges of Whiteness—including wealth, status, and the relative benefits (the greater social mobility, for example) of the digital economy to Whites.

The anxiety represented by Unabomber Theodore Kaczinski's acts of terrorism against technology cannot be separated from his anxiety over cultural and social changes wrought by the civil rights and feminist movements. Et mais plus ça change . . . none of the wealthiest forty young people in America are women. Most of the wealth of this younger generation is from the technologies of digital networks. A handful of these wealthy Americans are members of minority groups; of those, two are discernibly African American: Master P and Michael Jordan.¹⁷⁴ No women of color are profiled at all, nor are their absences noted.

In other words, economic gain to one racial group is aided and abetted by the political and social constructs imposed on all other racial groups. This is an old story with a new twist: virtual race. Thus, how we view virtual race is largely determined by the significance of material race and its consequences in the plain old physical world.

Because of the effects of oversteer and reversion, as well as the lack of boundary evaluation, Internet theorists and others who write about the Internet under-emphasize race and hence overestimate the absence of racism. Virtual race might make a difference in material racial practices. However, a critical race feminist view of Internet identity-shifting cautions that these differences ultimately pale in comparison to the power and impetus of material racial identities in shaping virtual racial identities.

174. *Id.*

